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Criminal Sanctions against Polluters: The EPA's Asbestos Problem

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CRIMINAL SANCTIONS AGAINST POLLUTERS: THE EPA'S ASBESTOS PROBLEM

ADAMO WRECKING CO. V. UNITED STATES 434 U.S. 275 (1978)

The purpose of the Federal Clean Air Act[1] was to create a uniform, national system of controls upon emission of air pollutants.[2] Originally passed in 1955,[3] the Act empowered the Department of Health Education and Welfare to administer its provisions.[4] Ultimately it came under the auspices of the Environmental Protection Agency.[5]

Although the Act was designed to achieve praiseworthy ends, it failed to stem significantly the increasing flood of industrial pollutants into the atmosphere. Much of the problem lay in a fundamental misconception of the roles which the federal and state governments would assume. Although air pollution is a national problem, the drafters of the Act believed that the states should individually assume the role as primary enforcers of pollution control.[6] The EPA became merely a

1. Hereinafter referred to in the text and in footnotes as the Clean Air Act.

2. 42 U.S.C. § 1857(b) (1970) provided:

(1) The purposes of this subchapter are to protect the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;
(2) to initiate and accelerate a national research and development program to achieve prevention and control of air pollution;
(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and,
(4) to encourage and assist the development and operation of regional air pollution control programs.

3. *See* 42 U.S.C. § 1857 (Supp. III 1952) for the text of the Clean Air Act as it was passed by the United States Congress in 1955.

4. 42 U.S.C. § 1857 (Supp. III 1952). This version of the law referred to the "Secretary of the Department of Health, Education and Welfare." *See* 42 U.S.C. § 1857 (Supp. III 1952).

5. 42 U.S.C. § 1857a (1970). This version of the statute refers to the "Administrator" of the Environmental Protection Agency. The Environmental Protection Agency will hereinafter be referred to in the text and in footnotes as the EPA.

6. *See* 42 U.S.C. § 1857d(b) (Supp. V 1959-63). That statute provided:

(b) Consistent with the policy declaration of this subchapter, municipal, State and interstate action to abate air pollution shall be encouraged and *shall not be displaced by Federal enforcement action* except as otherwise provided by or pursuant to a court order under subsection (g) of this section. (Emphasis added).

Even though the states were the primary administrators of the Clean Air Act, the federal government did retain some measure of enforcement power if the states failed to act. However, the federal enforcement role was strictly limited. First, only injunctive relief could be obtained; no criminal sanctions were available. Second, the Secretary had to wait a minimum of six months before federal enforcement action could even be considered.

As provided in 42 U.S.C. § 1857d(c)(4) (Supp. III 1965-67):

clearinghouse for information on technological developments in the area of pollution control and a planning agency whose expertise was available to the states.[7] This diffusion of power among the states proved totally inadequate to insure effective enforcement of the Act.

In 1970 Congress passed a sweeping and boldly innovative amendment to the Clean Air Act.[8] Perhaps the most important contribution of the new legislation was to centralize enforcement powers in the EPA. Thus, Congress eliminated the power vacuum that had haunted the original Act. In particular, section 113 of the Amendments delegated to the EPA Administrator the right to seek various civil and criminal sanctions for violations of the Act.[9]

The Amendments to the Clean Air Act further specifically authorized the EPA to promulgate "emission standards" for hazardous air pollutants.[10] Emission standards generally set a numerical limitation upon the amount of pollution that can be lawfully discharged into the atmosphere.[11] These standards were to be set at a level, which, in the Administrator's informed judgment, "provides an ample margin of

> Whenever, on the basis of surveys, studies and reports, the Secretary finds that the ambient air quality of any air quality control region or portion thereof is below the air quality standards established under this subsection, and he finds that such lowered air quality results from the failure of a State to take reasonable action to enforce such standards. . . . If such failure does not cease within one hundred and eighty days from the date of the Secretary's notification, the Secretary—
> (i) in the case of pollution of air which is endangering the health or welfare of persons in a State other than that in which the discharge . . . originate, may request the Attorney General to bring a suit on behalf of the United States . . . to secure abatement of the pollution.

7. Under 42 U.S.C. § 1857c-2 (Supp. III 1965-67), the Secretary was empowered to set air quality criteria:

> (b)(1) The Secretary shall, after consultation with appropriate advisory committees and Federal departments and agencies . . . develop and issue to the States such criteria of air quality as in his judgment may be requisite for the protection of the public health and welfare. . . . (2) Such criteria shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of an air pollution agent. . .

More importantly, the Secretary was to provide the latest technological data on pollution abatement devices:

> (c) The Secretary shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States . . . information on those recommended pollution control techniques the application of which is necessary to achieve levels of air quality set forth in criteria. . . Such recommendations shall include such data as are available on the latest available technology. . .

8. 42 U.S.C. § 1857 (1970) [hereinafter referred to as the Amendments].

9. 42 U.S.C. § 1857c-8(b),(c) (1970). Subsection (b) allows the Administrator to commence a civil suit for a permanent or temporary injunction. Subsection (c) provides for criminal penalties for violations of certain pollution control orders issued by the Administrator.

More importantly, under section 112 of the Amendments, the Administrator is free to act with or without State participation: "Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section." *See* 42 U.S.C. § 1857c-7(d)(2) (1970).

10. 42 U.S.C. § 1857c-7(b)(1)(A) (1970).

11. *See, e.g.*, 40 C.F.R. §§ 61.32, 61.42, 61.52 (1977). These sections set out emission standards for three compounds classified as hazardous pollutants: beryllium, mercury and chlorides.

safety to protect the public health."[12]

Unlawful emission of hazardous pollutants was subject to the harshest criminal sanctions provided for in the Amendments.[13] Violators of these standards, which were set forth in the federal regulations, could be penalized by fines up to $25,000 per day and imprisonment of not more than one year.[14] A petition for review of the promulgation of any EPA emission standard could be filed only in the Circuit Court of the District of Columbia and was not subject to review in subsequent civil or criminal proceedings.[15]

The EPA Administrator discovered, however, that emission standards, which were strictly numerical, were impractical tools of enforcement in some instances.[16] Certain types of emissions were either difficult to detect or defied accurate measurement by present technology.[17] In such cases, the Administrator imposed a "work practice" standard.[18] The work practice standard did not restrict pollution in numerical terms.[19] Rather, this type of standard defined the methods by which certain hazardous pollutants could be handled, removed and transported to minimize the release of the toxic substance into the atmosphere.[20]

The Amendments left unclear whether emission standards and work practice standards were synonomous and therefore subject to the same regulations. This precise question was presented to the United States Supreme Court in *Adamo Wrecking Co. v. United States.*[21] In

Each of these standards sets upper limits upon the amount of discharge of these pollutants which is allowed. The limits are expressed in numerical terms as parts per million.

12. 42 U.S.C. § 1857c-7(b)(1)(B) (1970).

13. 42 U.S.C. § 1857c-8(c)(1) (1970) provides:

> Any person who knowingly — . . . . (C) violates . . . section 1857c-7(c) (concerning emission standards) of this title shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year or both. . . .

14. *Id.*

15. 42 U.S.C. § 1857h-5(b) (1970). This statute provides, in relevant part:

> (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title . . . may be filed only in the United States Court of Appeals for the District of Columbia . . . Any petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.
> (2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

16. Letter from Russell E. Train to Gerald R. Ford, March 22, 1974, *cited in* United States v. National Wrecking Co., No. 74 CR 755 (N.D. Ill. Dec. 20, 1974).

17. *Id.*

18. *Id.*

19. *See* 40 C.F.R. § 61.22(d)(4)(i)-(v) (1977).

20. *Id.*

21. 434 U.S. 275 (1978).

Adamo, the Supreme Court was asked to decide whether the EPA's designation of work practice standards as emission standards was a proper exercise of rule-making power. The issue was of great significance in the overall scheme of regulation of hazardous pollutants because if a work practice standard was not authorized by statute, the EPA virtually would be foreclosed from controlling the discharge of toxic chemicals which cannot be measured numerically.

The Supreme Court found that the EPA had exceeded its statutory authority in promulgating work practice standards. The Court concluded that, as a matter of statutory construction, the EPA only had power to issue numerical limitations upon the discharge of pollutants. Work practice standards were an unjustifiable extension of the EPA's legislative mandate.[22]

The *Adamo* decision has resulted, at least temporarily, in the exclusion of certain toxic pollutants from regulation by the EPA. If Congress does not act to clarify the statute, the *Adamo* decision could cause a serious deterioration of our national environment.

This comment will discuss in detail the conflicting federal court interpretations of the Clean Air Act. The opinion in *Adamo Wrecking Co.* v. *United States* will be examined carefully in an effort to elucidate the significant policy considerations in the area of criminal due process which may have influenced the Supreme Court's decision. The serious impact that the *Adamo* decision may have upon the EPA as the administrative agency whose duty it is to enforce the Act will also be analyzed. Finally, suggestions will be presented for a technical amendment to the Clean Air Act which would, in effect, legislatively reverse *Adamo*.

NATURE OF THE CONTROVERSY

The controversy in *Adamo* involved two distinct but interdependent issues of statutory construction. The first issue centered upon the type of regulatory scheme that the EPA could use to enforce limitations upon the emission of asbestos. Asbestos is a versatile compound that has been used in the construction industry for decades. Its unique chemical properties make it an ideal insulator and fireproofing material. Asbestos is most often found in buildings as a chemical component in floor tiles and as an insulating material packed around pipes, boilers and furnaces.[23] As useful as asbestos is to the building trade, it is a

22. *Id.* at 574-75.
23. Horvitz, *Asbestos and Its Environmental Impact*, 3 ENVT'L AFF. 145 (1974).

toxic pollutant when released into the air as dust or shredded fibers during demolition.[24]

Unlike other hazardous pollutants, asbestos is not regulated in terms of a numerical emission standard. During demolition of a building the discharge of asbestos filaments and dust is virtually impossible to measure. Because of this, the EPA Administrator originally proposed an emission standard that would have prohibited any "visible emissions"[25] from commercial demolition operations. However, after realizing that demolition of many structures would be rendered impossible if visible emissions of asbestos were entirely prohibited, the Administrator determined that a total ban was not a practical solution. Rather, in response to the necessity of regulating asbestos, the Administrator promulgated the work practice standard as a more reasonable method of controlling asbestos pollution.[26] The asbestos work practice standard required that the asbestos be wet down prior to demolition.[27] The wetting procedure ideally would cause the asbestos in the building to congeal into a lumpy mass, thereby vastly reducing the likelihood that shredded filaments could escape into the air, as they would if the asbestos were dry and easily crumbled.[28]

Although the work practice standard seemed to be a reasonable compromise between the requirements of industry and the interest of the public in a healthy environment, the EPA's authority in this area was far from clear. Without doubt, criminal charges could be brought against persons who violated numerical emission standards.[29] But it was questionable whether similar charges could be sustained when a work practice standard was in issue.

The petitioners for the demolition company in *Adamo* contended that Congress intended emission standards to be strictly numerical limitations upon pollutant discharges. Work practice standards therefore

24. *Id.* at 146 (citing S. REP. No. 91-1282, 91st Cong., 2d Sess. (Oct. 6, 1970)). This report states:

> Because nothing has been done about the hazards of asbestos, even after the association of asbestos and lung cancer was first reported in 1935, 20,000 out of the 50,000 workers who have since entered one asbestos trade alone— insulation work—are likely to die of asbestosis, lung cancer or mesothelioma. Nor is the potential hazard confined to these workers, since it is estimated that as many as 3.5 million workers are exposed to some extent to asbestos fibers.

25. 36 Fed. Reg. 23242 (1971).

26. 38 Fed. Reg. 8820 (1973).

27. 40 C.F.R. § 61.22(d)(4)(iii) (1977) specifically provides:

> Pipes, ducts, bottle tanks . . . or structural members that are insulated or fire-proofed with fiable asbestos materials may be taken out of any building . . . provided the fiable asbestos materials exposed during cutting or disjointing are adequately wetted during the cutting or disjointing operation . . . .

28. *Id.*

29. 42 U.S.C. § 1857c-8(c)(1) (1970).

exceeded the EPA's statutory authority.[30]

The EPA countered this argument with a two-pronged analysis. First, if a work practice standard was not a valid emission standard, emission of asbestos, unlike other categories of hazardous pollutants, would not be subject to stiff criminal penalties. Thus, the asbestos work practice standard should be viewed as a species of emission standard, designed to achieve the same result as a numerical standard. Second, the Administrator's actions in promulgating the asbestos standard could be construed as banning the emission of asbestos entirely. The numerical emission standard for asbestos would then be zero. If the demolition company conformed to the work practice standard, however, the EPA would *waive* strict compliance with the numerical emission standard of zero parts per million. The numerical component of the emission standard would thereby be retained, even though the work practice guidelines would have effectively replaced it.[31]

The second issue presented in *Adamo* was whether Congress had granted exclusive jurisdiction to the Court of Appeals of the District of Columbia to decide any controversies arising under the Clean Air Act.[32] The EPA contended that any challenge to the federal regulations could be brought only in that forum.[33] Petitioners for the demolition industry argued that the role of the Court of Appeals of the District of Columbia was to insure that the regulations promulgated by the Administrator were neither arbitrary nor capricious. District courts, contended the petitioners, could not be foreclosed on jurisdictional grounds from considering whether a particular regulation was an emission standard within the statutory meaning of that term.[34]

The practical differences between the conflicting interpretations of the jurisdictional controversy is critical. From the viewpoint of the defendants, members of the demolition industry involved in criminal trials, their procedural due process rights were at stake. Historically, the burden was on the government to prove every element of the alleged offense beyond a reasonable doubt.[35] Yet if a work practice standard could be irrebuttably presumed to be an emission standard by the

30. *See, e.g.*, Defendant's Reply Memorandum in United States v. National Wrecking Co., No. 74 CR 755 (N.D. Ill. Dec. 20, 1974).

31. *See, e.g.*, Government's Response Brief in United States v. National Wrecking Co., No. 74 CR 755 (N.D. Ill. Dec. 20, 1974).

32. 42 U.S.C. § 1857h-5(b)(1) (1970).

33. *See* Government's Response Brief in United States v. National Wrecking Co., No. 74 CR 755, mem. op. at 11-14 (N.D. Ill. Dec. 20, 1974).

34. *See* Defendant's Reply Memorandum in United States v. National Wrecking Co., No. 74 CR 755, mem. op. at 10 (N.D. Ill. Dec. 20, 1974).

35. LAFAVE & SCOTT, HANDBOOK ON CRIMINAL LAW 146 (1972).

EPA's mere designation, at least one element of the alleged criminal conduct could be immunized from challenge by the defense in the proceeding.[36] The burden on the government would therefore be lightened. Conversely, the defense would be handicapped since it would be denied a potentially fruitful avenue of attack upon the charges.

From the EPA's perspective, the demise of jurisdictional exclusivity for hazardous pollutant regulation could be disastrous. Uniformity of decision-making would be undermined. Instead of a single appellate court exercising exclusive jurisdiction, each district court in the country could be free to examine the nature of the standards. A multiplicity of conflicting decisions and prolonged litigation over what elements constitute an emission standard would no doubt result. Thus, effective and prompt enforcement of pollution control regulations would be thwarted to the ultimate detriment of the national goal of a safe and healthy environment.

THE ANATOMY OF AN EMISSION STANDARD

Prior to *Adamo*, the first courts to consider these issues were the district courts for the northern district of Illinois. Four cases against demolition companies were prosecuted simultaneously.[37] Each involved virtually identical fact patterns. The defendant companies had torn down buildings which contained asbestos-insulated boilers and pipes. None of the defendants had followed the work practice standards specified in the regulations.

Each information filed against the companies was dismissed upon motion by the defendants.[38] The narrowest ground for dismissal was that the informations, as drafted by the United States attorney, failed to charge that the demolition companies had actually *caused* the discharge of asbestos into the atmosphere.[39] The informations simply al-

36. *See* Heiner v. Donnan, 285 U.S. 312 (1932), in which the Supreme Court held unconstitutional the irrebuttable presumption that a gift made within 2 years of death was "in contemplation of death" for federal estate tax purposes. The Clean Air Act does not go so far as to create an irrebuttable presumption that *any* standard is an emission by the Administrator's mere designation. As a practical matter, however, the same result occurs in a criminal enforcement proceeding if the validity of the standard is not susceptible to challenge by the defendant.

37. United States v. Brandenburg Demolition, Inc., No. 74 CR 757 (N.D. Ill. Jan. 31, 1975); United States v. Harvey Wrecking Co., No. 74 CR 758 (N.D. Ill. Jan. 7, 1975); United States v. Nardi Wrecking Co., No. 74 CR 756 (N.D. Ill. Jan. 2, 1975); United States v. National Wrecking Co., No. 74 CR 755 (N.D. Ill. Dec. 20, 1974).

38. *Id.*

39. *See* Memorandum Opinion of Judge Bernard Decker in United States v. National Wrecking Co., No. 74 CR 755, mem. op. at 2 (N.D. Ill. Dec. 20, 1974) which states, "The information does not charge that any air pollutant was emitted in violation of the standard; it charges only that the standard was violated."

leged that the defendants had carried on demolition without following the procedures prescribed in the federal regulations.[40] Because the informations did not allege with specificity that the defendants had committed a prohibited act, they were found to be fatally defective.

Each memorandum opinion went beyond the narrow issue of the sufficiency of the informations, however, and considered whether the EPA could seek criminal sanctions for violation of a work practice standard.[41] Each of the opinions decided that the EPA could not.

The critical question confronting each court was whether a work practice standard was a species of emission standard. The courts held that language previously employed by the Administrator compelled a finding that the two standards were quite different in nature. In a letter from Russell Train, former EPA Administrator, to Gerald Ford,[42] certain proposed amendments to the Clean Air Act were discussed. The Administrator stated:

> Although EPA can establish Federal emission standards . . . for sources emitting hazardous pollutants, there are occasions where emission limitations are not the most practical method of control. For example, *emission standards are not appropriate* in cases where emissions from a source are difficult to measure . . . . EPA is requesting authority to set *design or equipment standards* for . . . hazardous pollutants whenever the limitations of measurement technology make emission standards impractical. . . .[43]

The Administrator also drew a clear line of demarcation between the two standards when he decided not to promulgate a visual emission standard for asbestos:

> [T]he no visible emission requirement would prohibit repair or demolition in many situations, since it would be impracticable, if not impossible, to do such work without creating visible emissions. Accordingly, the promulgated standard specifies certain work practices which must be followed when demolishing certain buildings or structures.[44]

These admissions by the Administrator were construed strongly against him in each decision. His language clearly indicated that work practice standards were merely *techniques* designed to achieve lower emis-

40. *Id.*

41. The opinions in *Nardi Wrecking Co., Harvey Wrecking Co.,* and *Brandenburg Demolition* all concurred or cited with approval Judge Decker's reasoning in *National Wrecking Co.* Judge Decker examined work practice standards in his Memorandum Opinion. No. 74 CR 755, mem. op. at 3-4 (N.D. Ill. Dec. 20, 1974).

42. Letter from Russell E. Train to Gerald R. Ford, March 22, 1974, *cited in* United States v. National Wrecking Co., No. 74 CR 755 (N.D. Ill. Dec. 20, 1974).

43. *Id.*

44. 38 Fed. Reg. 8820 (1973).

sions of asbestos, not emission standards in themselves.[45]

Thus the EPA lost its first test in the courts on the grounds that work practice and emission standards were distinctly different methods of regulation and that the Clean Air Act did not give the EPA authority to promulgate work practice standards.

JURISDICTIONAL EXCLUSIVITY

The northern district of Illinois cases remained the only opinions in this area until *United States* v. *Adamo Wrecking Co.*[46] was decided by the Court of Appeals for the Sixth Circuit. The indictment in *Adamo* was drafted to avoid the pitfalls which had befallen the Illinois cases.[47] Nonetheless, the EPA again lost its case in the district court[48] for virtually the same reasons as those expressed by the Illinois courts in dicta.

The Sixth Circuit reversed the lower court. It did not address directly the work practice-emission standard dichotomy.[49] Instead, the court focused exclusively upon the district court's jurisdiction to deal with the validity of EPA standards.[50] The Sixth Circuit found that section 307(b) of the Clean Air Act foreclosed review of EPA standards by the district courts.[51] The court concluded that the only forum available for any challenge to the Administrator's action was the Court of Appeals for the District of Columbia.[52] Congress had exercised its constitutional prerogative of limiting the jurisdiction of certain federal courts in the statute. Jurisdictional exclusivity applied whether the basis for the challenge was the procedure by which the regulations were adopted or whether it was an attack upon the substance of the regula-

45. United States v. National Wrecking Co., No. 74 CR 755, mem. op. at 4 (N.D. Ill. Dec. 20, 1974).

46. 545 F.2d 1 (6th Cir. 1976).

47. The indictment clearly specified that the defendants had *caused* the discharge of asbestos into the atmosphere. The informations in the northern district of Illinois cases had only alleged a violation of federal regulations. *Id.* at 3.

48. *Id.*

49. Although the court determined that the definition of an "emission standard" was not essential to its decision, it did address the issue in a footnote. The court stated:

> We note, of course, that appellee claims that no matter what the Administrator called this regulation, it was a 'work practice' standard rather than an 'emission standard.' We see nothing inconsistent with the purposes of this statute in the Administrator's promulgation of a 'work practice' as a condition of an emission standard which, absent fulfillment of the work practice conditions, otherwise prohibits any emission of particulate asbestos material into the ambient air.

545 F.2d at 6 n.2.

50. *Id.* at 4.

51. *Id.* at 6.

52. *Id.* (citing 42 U.S.C. § 1857h-5(b)(1) (1970)).

tions themselves.[53]

Exclusivity of review is not a novel practice. The United States Supreme Court had confronted a similar statutory provision over thirty years before in *Yakus* v. *United States*.[54] The Sixth Circuit specifically relied upon *Yakus* in reaching the *Adamo* result.

The controversy in *Yakus* arose under the Emergency Price Control Act of 1942.[55] The statute contained provisions, enforceable by criminal penalties, prohibiting the wilful sale of agricultural products above the prices set forth in regulations.[56] The statute allowed challenges to the maximum price regulations set by the Price Administrator within sixty days of their promulgation.[57] Review of the regulations was exclusively granted to the Emergency Court of Appeals.[58] The defendants in *Yakus* did not avail themselves of this judicial forum. Rather, they chose to attack the regulation on statutory and constitutional grounds in the enforcement proceeding.

The Supreme Court in *Yakus* upheld the convictions of the defendants. The Court emphasized that the defendants had failed to exhaust their administrative and judicial remedies:

> As we have seen, Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional limitations, create the Emergency Court of Appeals, give it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation.[59]

Thus, to the extent that the defendants had a reasonable opportunity to be heard and to present evidence, further judicial review of the matter could be foreclosed consistent with due process.[60]

The Sixth Circuit in *Adamo* found further support for its decision in the legislative history of the Clean Air Act. The question of exclusive judicial review had been considered by the Senate. The pertinent Senate report explained that the District of Columbia Circuit had been granted exclusive jurisdiction in order to assure "even and consistent

53. *Id.* at 4-5.
54. 321 U.S. 414 (1944).
55. Pub. L. No. 1, ch. 26, 56 Stat. 23 (1942).
56. Pub. L. No. 1, ch. 26 § 3(a), 56 Stat. 23, 27 (1942).
57. Pub. L. No. 1, ch. 26, § 203(a), 56 Stat. 23, 31 (1942).
58. Pub. L. No. 1, ch. 26, § 204(a), 56 Stat. 23, 31 (1942).
59. 321 U.S. 414, 443 (1944).
60. *Id.*

application" of the standards.[61] Uniformity of decision-making by the courts was a key purpose of the Congress. The Sixth Circuit concluded that the demolition company had neither challenged the regulation in a timely manner nor in the appropriate forum.[62] The district courts were therefore barred from hearing the company's defense.

The court recognized that its holding was at variance with the decisions rendered by the courts for the northern district of Illinois. It distinguished those cases on the ground that the informations, as drafted, were fatally defective.[63] The portions of the memorandum opinions which considered the work practice-emission standard dichotomy were merely unpersuasive dicta according to the court.[64] Thus, the Sixth Circuit found it unnecessary to reach the crucial issue of whether a work practice standard was a species of emission standard.[65] Its holding was based on narrow jurisdictional grounds, rather than on the substantive claim.

THE SUPREME COURT DECISION

The Supreme Court granted certiorari[66] in the *Adamo* case in order to resolve the conflicting interpretations as to the types of defenses available for violations of the Clean Air Act and to decide where jurisdiction would properly lie. Justice Rehnquist, writing for the majority,[67] succinctly phrased the issue as: "When is an emission standard not an emission standard?"[68]

Resolution of the Jurisdictional Controversy

The Court first addressed the jurisdictional issue, and initially noted that the Clean Air Act provided a complex interrelationship between judicial review of EPA actions and criminal sanctions. Subsection A of the penalties provision of the Act punished violation of implementation plans after notice has been given to the violator.[69] Subsection B was a very broad clause which imposed criminal sanctions upon "any person who knowingly . . . violates" orders issued by

61. 545 F.2d 1, 6 (6th Cir. 1976) (citing S. REP. No. 91-1196, 91st Cong., 2d Sess. 40-42 (1970)).

62. 545 F.2d 1, 6 (6th Cir. 1976).

63. *Id.*

64. *Id.*

65. *Id. See* note 49 *supra* for the court's discussion of the emission standard issue.

66. 430 U.S. 953 (1977).

67. Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger, Justices White, Marshall and Powell joined. Justice Powell also filed a concurring opinion.

68. 434 U.S. 275, 278 (1978).

69. 42 U.S.C. § 1857c-8(c)(1)(A) (1970).

the Administrator, including record-keeping and inspection requirements.[70] Finally, subsection C, the specific part of the Amendments in issue in *Adamo*, made violations of emission standards punishable by criminal penalties.[71] Violations of other provisions of the Act were merely enforceable by injunction or civil suit for damages.[72] Within the framework of particularly harsh criminal sanctions for the violation of an emission standard, the Court turned to consideration of the jurisdictional controversy.

The first hurdle was *Yakus*, upon which the Sixth Circuit had relied as authority. The Court distinguished *Yakus* on the grounds that the Clean Air Act went far beyond the relatively simplistic provisions of the Emergency Price Control Act.[73] Unlike *Yakus*, there was a complex, interlocking system of civil as well as criminal penalties under the Clean Air Act. Congress had singled out violators of emission standards for particularly harsh treatment and had subjected them to penalties which would not be imposed upon violators of other sections of the Act.[74] More importantly, certain defenses could possibly be denied them, which could be asserted by violators of other orders of the Administrator.[75] The Court considered these rules particularly harsh for the small businessman.[76] To protect his interests, the small businessman must keep constantly abreast of proposed emission standards in the Federal Register. The Court reasoned that only by immediate court action initiated in the District of Columbia could a party be assured that a forum would be available to hear his claim.

Because of these severe limitations upon the defenses that could be raised in a criminal proceeding, the Court carefully scrutinized the statute to determine if jurisdictional exclusivity was intended by Congress in this case. The Court concluded that the statute was sufficiently ambiguous as to create a doubt about Congressional intent.[77] Since the due process rights of a criminal defendant were involved, the Court determined that the ambiguity of the statute must be construed in favor

70. 42 U.S.C. § 1857c-8(c)(1)(B) (1970).
71. 42 U.S.C. § 1857c-8(c)(1)(C) (1970).
72. 42 U.S.C. § 1857c-8(b) (1970).
73. 434 U.S. 275, 283 (1978).
74. *Id.*
75. *Id.*
76. *Id.* at 283 n.2.
77. *Id.* at 283. The Court stated, ". . . Congress intended, within broad limits, that 'emission standards' be regulations of a certain type, and that it did not empower the Administrator, after the manner of Humpty Dumpty in 'Through the Looking Glass,' to make a regulation an 'emission standard' by his mere designation."

of the defendant.[78] Therefore, the Court concluded that the district courts were courts of competent jurisdiction to consider whether an essential element of the indictment or information, the alleged emission standard, was in fact such a standard as envisioned by Congress.[79]

The Court tempered the scope of its ruling, however, with a strict limitation upon the issues which the district courts could consider. The district courts could not probe into the nature of the proceedings under which the regulation was promulgated nor could they consider whether the regulation was arbitrary or capricious.[80] An administrative review proceeding of this sort was the sole province of the Court of Appeals for the District of Columbia. The district courts could only decide if the purported regulation was indeed an emission standard. Thus, regulations would not be open to wholesale challenge in the various districts. The possibility of conflicting decisions and years of litigation over various provisions of the Act would be greatly reduced.

The Court's Definition of an Emission Standard

Having concluded that jurisdiction was proper in the district courts, the Court turned to the issue of whether a work practice standard could be construed as an emission standard. The Court determined that the two standards were quite distinct. An emission standard was a *quantitative limit* upon the lawful discharge of pollutants into the atmosphere, while a work practice standard was a *technique* designed to reduce pollutant emissions.[81]

The language of section 112(b)(1)(B)[82] supported the Court's interpretation. The Court stated, "The Administrator shall establish any such standard *at the level* which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant."[83] The term "level" implies a quantitative measurement. A work practice standard is not a measurement, but a methodology

78. *Id.* at 285 (citing United States v. Bass, 404 U.S. 336, 348 (1971), and Rewis v. United States, 401 U.S. 808, 812 (1971)).

79. *Id.* at 285.

80. *Id.* The Court's holding on the jurisdictional issue was deliberately narrow. The Court stated:

> The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. . . . The question is only whether the regulation which the defendant is alleged to have violated is on its face an 'emission standard' within the broad limits of the congressional meaning of that term.

81. *Id.* at 286.

82. 42 U.S.C. § 1857c-7(b)(1)(B) (1970).

83. 434 U.S. 275, 286 (1978).

which can be used to achieve acceptable levels of pollutant discharge. Logically, the two types of standards are distinguishable.

The Court found that the Administrator himself had adopted this distinction several years before.[84] Indeed, the work practice standard was adopted only *after* a numerical emission standard had not proved feasible.[85] Significantly, Congress itself had endorsed this view during discussion of the 1977 Amendments to the Clean Air Act. The Senate report at that time re-emphasized its "strong preference for numerical standards."[86] Furthermore, the report supported the addition of section 112(e) to the Act, which would allow the Administrator to promulgate work practice standards.[87] By implication, the Administrator did not have such powers previously.

The Court concluded that work practice standards were not synonomous with emission standards. Neither the criminal penalties provision of the Act nor the provision for jurisdictional exclusivity were applicable to work practice standards. In effect, the Court decided that the asbestos work practice standard was unenforceable.

Dissenting Opinions

Justice Stewart and Justice Stevens wrote dissenting opinions in *Adamo*. Justice Stewart's opinion[88] basically reiterated the conclusions reached by the Sixth Circuit when it considered the *Adamo* case originally. Stewart concluded that the majority's reasoning circumvented the plain intent of Congress that actions of the Administrator should not be subject to review in any civil or criminal enforcement proceeding.[89] He noted that Congress, in order to assure uniformity of interpretation of the Clean Air Act, had unambiguously provided for exclusive judicial review of any actions taken by the Administrator in the Court of Appeals for the District of Columbia.[90] Further evidence of Congress' intent, Justice Stewart said, lay in the section of the Act which limited the time for appeals to thirty days.[91] He concluded, therefore, that Congress' overriding concerns were twofold: that decision-making be prompt and that judicial interpretation of this complex piece of legislation be uniform.

84. 38 Fed. Reg. 8821 (1973).
85. *Id.*
86. 434 U.S. 275, 289 (1978) (citing S. REP. NO. 95-127, 95th Cong., 1st Sess. 44 (1977)).
87. Pub. L. No. 95-190, § 14(a)(79), 91 Stat. 1404 (1977).
88. Justices Brennan and Blackmun concurred in Justice Stewart's opinion.
89. 434 U.S. 275, 291 (1978) (Stewart, J., dissenting).
90. *Id.*
91. *Id.*

Justice Stewart noted that the majority's interpretation conflicted with both of these goals. First, the decision undermined uniformity since various district courts were free after *Adamo* to decide what elements constituted an emission standard.[92] Second, the tortuous procedures inherent in the appellate mechanism and inevitable lengthy delays would inevitably frustrate the purpose of Congress in establishing a strict time limit for appeals.[93] Thus, Justice Stewart reasoned that review of the Administrator's action was to be available in only one forum. Since the petitioner demolition company had not availed itself of that opportunity, it should be barred from raising the emission standard issue in a subsequent enforcement proceeding.

Justice Stevens, in contrast to Justice Stewart, focused exclusively upon the work practice-emission standard dichotomy. Stevens felt that the jurisdictional argument was based on the unarticulated premise that the asbestos regulation was a bona fide emission standard under section 307(b).[94] Only an emission standard was subject to the exclusive review provision of the statute. Therefore, according to Justice Stevens, Justice Stewart's argument begged the ultimate question.

Justice Stevens found it necessary to consider the nature of an emission standard in detail. He noted that when Congress passed the Clean Air Act Amendments in 1970, it was gravely concerned about the health hazard posed by asbestos emissions.[95] Congress went so far as to express its determination to accept factory closings as the price for control of asbestos pollution.[96] Consequently, Justice Stevens argued:

> [t]here is no evidence that Congress intended to require the Administrator to make a choice between the extremes of closing down an entire industry and imposing no regulation on the emission of a hazardous pollutant; Congress expressed no overriding interest in using a numerical standard when industry is able to demonstrate that a less drastic control technique is available, and that it provides an ample margin of safety to the public health.[97]

Congressional intent, in the eyes of Justice Stevens, was clear and unambiguous. The EPA had been given authority to reduce asbestos emissions through the use of techniques which provided an "ample margin of safety" for the public.

92. *Id.*
93. *Id.*
94. *Id.* at 294 n.1 (Stevens, J., dissenting).
95. *Id.* at 296-97 n.8 (citing *A Legislative History of the Clean Air Act Amendments of 1970*, Ser. No. 93-18, 93d Cong., 2d Sess. 133 (1971)).
96. *Id.* at 296.
97. *Id.* at 298-99 (Stevens, J., dissenting).

Justice Stevens buttressed his reasoning by citing one of the elementary rules of statutory construction, *i.e.*, that when presented with an ambiguous statute the judiciary should give great weight to the construction which the agency charged with its administration has placed upon it.[98] Under this rule, the agency's construction need not be the only reasonable interpretation. It need only be sufficiently reasonable under all the circumstances.[99] Therefore, according to Justice Stevens, even if "emission standard" is an ambiguous term, the Court should have deferred to the Administrator's interpretation, which included work practice standards.[100]

Finally Justice Stevens noted that the majority opinion had misinterpreted the history of the 1977 Amendments to the Act. As introduced in the Senate, the 1977 Amendments clearly specified that a design, equipment or operational standard was a type of "hazardous emission standard."[101] When the bill emerged from conference, however, it no longer precisely defined a work practice standard as a species of hazardous emission standard.[102] The conference report explained that the change in language was meant to clarify an unrelated part of the Senate bill.[103] Thus the Amendments neither confirmed nor conflicted with the Administrator's contention that he had authority to enforce work practice standards.

CRITIQUE

The decision in *Adamo* leads to the anomalous result that the EPA can promulgate work practice standards,[104] but has no means by which to enforce them. Congress, in the 1977 Amendments to the Clean Air Act, did not amend section 112(c), which permitted enforcement of "emission standards" only. Since the *Adamo* Court determined that work practice standards were not a category of emission standard, the criminal penalties section of the Amendment does not apply. The Administrator is placed in the unenviable position of (1) allowing the un-

98. *Id.* at 302 (citing Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 315 (1933)). In that opinion Justice Cardozo stated: ". . . practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

99. *Id.* at 301 (citing Udall v. Tallman, 380 U.S. 1 (1964)).

100. *Id.* at 302.

101. *Id.* at 303-04 nn.21&22 (citing Letter from Environmental Protection Agency Administrator to Senate Public Works Committee Chairman Supporting Proposed Amendments to the Clean Air Act (Feb. 3, 1975)).

102. *Id.*

103. *Id.* at 304 n.23 (citing H.R. REP. No. 95-564, 95th Cong., 1st Sess. 131-32 (1977)).

104. *Id.* at 306-07.

controlled emission of asbestos, a known carcinogen, or (2) promulgating a numerical emission standard which would virtually prohibit the demolition of certain structures.

The only solution to the EPA's quandry would seem to be a technical amendment to the wording of section 112(c). The language of the amendment could clearly specify that a work practice standard is a form of emission standard. Alternatively, the scope of section 112(c) could be expanded to include work practice standards as well as emission standards. Violations of any work practice standard would then be clearly enforceable under the criminal penalties provision of the Act.

The jurisdictional portion of the holding presents a more delicate drafting problem, one which is perhaps insurmountable. Congress plainly intended to restrict the scope of jurisdiction and the amount of time which a petitioner has to challenge emission standards, thereby insuring uniformity of decision-making and prompt resolution of conflicts. However, the Court in *Adamo* distinguished *Yakus*, the principal case upholding jurisdictional and time bars, indicating that the government still retained its burden of proving all elements alleged in any criminal indictment based upon a violation of federal regulations. The Administrator's designation of a particular standard as an emission standard was not conclusive on this key issue. In fact, Justice Powell in his concurring opinion,[105] stated that the jurisdictional and time bars in a criminal case might well constitute a violation of the defendant's constitutionally protected due process rights.[106] The forum designated by Congress may not provide an adequate opportunity for persons affected by the Act to protect their interests. Dicta in the majority opinion tends to support this view.[107] The Court's holding in *Adamo* thus leaves open the question of whether a statute can be drafted to impose jurisdictional and time bars where the rights of a defendant in a criminal case are in issue, or whether such a statute is an unconstitutional infringement upon due process rights.

If the Court's decisions continue to limit *Yakus* strictly to its facts, it could sound the death knell for prompt implementation of many fed-

105. *Id.* at 289 (Powell, J., concurring).

106. *Id.* at 290. Justice Powell clearly expressed doubts as to the validity of time and jurisdictional bars in a criminal action:

> The 30-day limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded. It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register.

107. *Id.* at 283 n.2.

eral programs. As a policy matter, such a result could severely cripple national programs such as the Clean Air Act and the Water Pollution Control Act[108] so as to make them unworkable. Ultimately, the public health and welfare would suffer as more toxic pollutants were emitted into the waters and air. In this respect, *Adamo* may have set a dangerous precedent.

If, however, the expansion of jurisdiction is limited to the *sole* issue of what constitutes an emission standard, the decision can be viewed as a reasonable compromise between the defendant's constitutional rights in a criminal case and the urgent need to resolve conflicts arising under the Act. It seems doubtful that a flood of litigation on this narrow issue will result. Proper revision of the wording of section 112(c) to include any design, equipment or operational standard should eliminate many spurious challenges at the district court level.

CONCLUSION

As a result of *Adamo Wrecking Co. v. United States*, emission of asbestos, a highly toxic pollutant, is uncontrolled in the United States today. The public health menace from this hazardous substance has been clearly demonstrated. Congress alone can act to clarify the authority of the EPA in the area of asbestos control, and thereby relegate asbestos once again to the list of hazardous pollutants.

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108. 33 U.S.C. §§ 1251-1376 (Supp. II 1972).